



**Mutuma & 2 others v Isiolo County Government & another; Hassan (Interested Party)
(Constitutional Petition E004 of 2023) [2024] KEHC 13188 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION E004 OF 2023**

EM MURIITHI, J

OCTOBER 31, 2024

**IN THE MATTER OF COMPOSITION OF MEMBERS OF THE COUNTY
EXECUTIVE COMMITTEE AND VETTING OF THE NOMINEES TO THE
POSITION OF CHIEF OFFICERS OF ISIOLO COUNTY GOVERNMENT**

BETWEEN

**THURANIRA SALESIO MUTUMA 1ST PETITIONER
HASSAN GUYO SHANO 2ND PETITIONER
JILO BUKE SAID 3RD PETITIONER**

AND

**ISIOLO COUNTY GOVERNMENT 1ST RESPONDENT
GOVERNOR, ISIOLO COUNTY GOVERNMENT 2ND RESPONDENT**

AND

ABDIKADIR HASSAN INTERESTED PARTY

RULING

1. A Notice of Preliminary Objection dated 6/11/2023 was taken out by the 2nd Respondent on the grounds that:
 1. The Honorable Court lacks jurisdiction to hear and determine this matter in light of Article 162 (2) and (3) of *the Constitution* of Kenya, 2010 as read with section 12 (1) of the Employment and Land Relations Act, 2011.
2. In their submissions filed on 20/2/2024, the 1st and 2nd Petitioners urge that they have brought the petition in public interest and the issues raised therein relate to violations of constitutional provisions and infringement of rights and the appropriate court to hear and determine the matter is the High



Court. They urge that they are not employers of the Respondents neither does the nature of their relationship fit the classes described under section 12 of the Employment and *Labour Relations Act*, therefore ousting the jurisdiction of the ELRC court. They urge that the constitutional questions raised in the Petition and the reliefs sought therein do not in any way fall within any of the categories or classes as captured by section 12 of the *Employment and Labour Relations Court Act*, and cite *Bridge International Academies Limited v James Momanyi* (2017) eKLR, *Sollo Nzuki v Salaries and Remuneration Commission & 2 Others* (2019) eKLR and *Law Society of Kenya v Federation of Kenya Employers* (2021) eKLR. They pray for the dismissal of the preliminary objection with costs to pave way for the hearing and determination of the petition on merits.

3. The 3rd Petitioner did not file any submissions.
4. The 1st Respondent did not file any submissions.
5. The 2nd Respondent insists that the decision the Petitioners seek to challenge is an employment dispute, which dispute can only be entertained by the Employment and Labour Relations Court. It urges the court to decline the invitation to entertain this matter on the basis that it lacks jurisdiction, and cites *United States International University (USIU) v Attorney General* (2012) eKLR, *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others* (2012) eKLR and *Owners of Motor Vessel 'Lilian S' v Clatex Oil (Kenya) Limited* [1989] KLR 1. It urges that where *the constitution* or an Act of Parliament has prescribed a procedure in which a specific issue is to be addressed, such procedure must be followed strictly, and cites *Speaker of National Assembly v Karume* (1992) eKLR and *Benard Murage v Fine Serve Africa Limited & 3 others* (2015) eKLR.
6. The Interested Party did not file any submissions.

Analysis and Determination

7. After a meticulous consideration of the Preliminary Objection and the written submissions together with the authorities cited therein, the singular issue for determination is whether this court is vested with the requisite jurisdiction to entertain the matter.
8. What properly constitutes a preliminary objection has been defined times over including in the locus classicus case of *Mukisa Biscuit Company v Westend Distributor Limited* (1969) EA 696 as follows:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. Comparatively, this court in *Meru Succession Cause No. 26/1988 In the Matter of the Estate of Thomas Mbui Njenge Alias Thomas Nchenge (Deceased) David Mbuko T. Mbui v Susan Gacheri* VOL. 8 NO. 62 held that:

“In the circumstances, a preliminary objection should only be raised where there are no disputations on matters of facts by parties. Although parties did not address the Court on the import and tenor of a preliminary objection, this Court finds this to be an important matter which has the potential of either granting or divesting this Court with jurisdiction to entertain the preliminary object which forms the subject of this Ruling. This Court cannot overlook the question of jurisdiction, even with respect to entertain the preliminary objection. Should this Court find that there any disputations of fact which will require it to



look at evidence adduced and interrogate factual issues, the Court will not have jurisdiction to entertain the preliminary objection.”

10. The legal matrix of the Petitioners’ grievance is the alleged violation of Articles 10, 27, 27, 73, 75, 174, 201, 232 and 235 of *the Constitution*. In their amended petition dated 4/9/2023, they seek specific reliefs that:
 1. Declaration that the petition is a public litigation matter.
 2. This Honorable Court be pleased to issue order to the effect that the 1st and 2nd Respondents shall not suffer any prejudice by the grant of the orders sought.
 3. This Honorable Court be pleased to issue an order declaring that the current composition of Isiolo County Executive Committee Members and Chief Officers as being discriminatory in view of breaching Article 27 (8) of *the Constitution* of Kenya, 2010 and therefore not properly constituted.
 4. This Honorable Court be pleased to issue an order annulling/ quashing the appointment of the All the interested parties since the same is unconstitutional, illegal, irregular, ultra vires, null and void ab initio and in contravention of Articles 10, 27, 27, 73, 75, 174, 201, 232 and 235 of *the Constitution* of Kenya, 2010 as well as the provisions of Section 58 of the *County Governments Act*, 2012; contrary to Sections 4 and 5 of the *Fair Administrative Action Act*, 2015; contrary to Section 10 of the *Public Service (Values and Principles) Act*, 2015 and Section 4 (1), 7, 8, 9, 10, 11 and 52(1) of the *Leadership and Integrity Act*, 2012.
 5. This Honorable Court be pleased to issue an order prohibiting and compelling all the interested parties to cease from performing the functions and/or discharging the duties of the office of their respective departments.
 6. This Honorable Court be pleased to issue an order that the entire recruitment of the 31 interested parties in the positions Chief Officers for various departments is bloated and unnecessary burden to the tax payers of Isiolo County, therefore be and is hereby nullified.
 7. This Honorable Court be pleased to issue an order directing the 2nd Respondent to resubmit to the 1st Respondent another reasonable list of number a qualified persons for vetting as Chief Officers for various departments.
 8. This Honorable Court be pleased to quash the 2nd Respondent appointment of the 32nd and 33rd interested parties to the positions of Deputy County Secretaries and the letters of appointment issued to them by the 2nd Respondent be deemed null and void since such positions don’t exist under the established laws.
 9. This Honorable Court be pleased to issue a declaration that the acts of the 2nd Respondent in usurping the mandate and powers of the County Public Service Board as stipulated in Sections 59 and 62 of the *County Governments Act* No. 17 of 2012 is null and void ab initio.
 10. This Honorable Court be pleased to issue an order of Mandamus compelling the Director of the 1st Respondent to forthwith provide at his cost, information sought by the 3rd Petition vide his letter ICA/JBS/01/2023.
 11. Any other better order/relief the Honorable Court may deem fit to grant.
 12. Each party to the suit herein to bear their own costs.



11. In the locus classicus case of Owner of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited (1989) eKLR, Nyarangi JA. held as follows: -

“...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction....”

12. The 2nd Respondent urges that the jurisdiction of this court to determine this matter is ousted by the provisions of section 12 of the [Employment and Labour Relations Court Act](#). That section expressly provides for disputes which fall within the exclusive jurisdiction of the Employment and Labour Relations Court as follows:

“(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of [the Constitution](#) and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including— (a) disputes relating to or arising out of employment between an employer and an employee; (b) disputes between an employer and a trade union; (c) disputes between an employers’ organisation and a trade union’s organisation; (d) disputes between trade unions; (e) disputes between employer organisations; (f) disputes between an employers’ organisation and a trade union; (g) disputes between a trade union and a member thereof; (h) disputes between an employer’s organisation or a federation and a member thereof; (i) disputes concerning the registration and election of trade union officials; and (j) disputes relating to the registration and enforcement of collective agreements.”

13. Conversely, the High Court draws its jurisdiction from Article 165 (3) of [the Constitution](#), which provides that:-

“(3) Subject to clause (5), the High Court shall have — (a) unlimited original jurisdiction in criminal and civil matters; (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144; (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of — (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.”



14. The question that lingers is whether the dispute herein falls within the province of the Employment and Labour Relations Court as enshrined under Article 162 (2) and (3) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*. The Employment and Labour Relations Court is vested with jurisdiction over disputes which relate to employment and labour as between employees, employers, trade unions and employers' organizations or federations.. Evidently, no employment relationship exists between the parties herein as the Petitioners are, in all honesty, not employees of the Respondents, but ordinary citizens who have brought the petition in their individual capacities in the exercise of their rights under Articles 22 and 258 of *the Constitution*.
15. Can the provisions of section 12 of the *Employment and Labour Relations Court Act* be properly invoked in the absence of an express employer-employee relationship? The answer is in the negative.
16. In *Joy Brenda Masinde v Law Society of Kenya & another* [2015] e KLR, the court (Maureen A. Odera J) declined to uphold the preliminary objection based on jurisdiction as follows:

“The petitioner herein had merely expressed an intention to apply for the advertised position. She had not yet been recruited and as such cannot be said to be an employee...From the above definition it is quite clear that no employment relationship exists between the petitioner and the 1st respondent. A mere intention to apply for a position does not confer employee status upon the petitioner. The matter or question in issue in this petition is the legality of the decision by the 1st respondent to introduce a qualification for the position of Secretary/CEO which is not provided by Statute being Section 26(4) of the *Law Society of Kenya Act*. The matter for determination is not a recruitment issue. Rather it is a purely constitutional issue which this court has jurisdiction to determine by virtue of Article 165(3) of *the Constitution*. The question is whether the 1st respondent a statutory body in any way exceeded its mandate and in so doing infringed upon the rights of the petitioner. This is not a labour dispute. I find that these are questions not for the Employment and Labour Relations Court but rather are for determination by the High Court.”

17. Similarly in *Nick Githinji Ndichu v Clerk Kiambu County Assembly and Another* [2014] eKLR, the court (Mathews N. Nduma J) discussed the jurisdiction of the Employment and Labour Relations Court as follows:

“It is clear from the foregoing that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must;

- (i) be having an oral or written contract of service;
- (ii) be providing a service to a real or legal person;
- (iii) be receiving a wage / salary for the services rendered.

If such a person has a dispute with the person with whom he/she has a contract of service and to whom he / she provides services for a wage or salary, the court has jurisdiction over such dispute and has available remedies for that purpose.”

18. This Court is being asked to interrogate inter alia whether in writing appointment letters of civil servants and creating additional positions thereof, the 2nd Respondent acted ultra vires by usurping the mandate of the County Public Service Board, thereby contravening *the Constitution*. That is



not a matter of the recruitment and the ultimate appointment of the civil servants, but a purely constitutional issue which falls squarely within the jurisdictional purview of this court.

19. This court finds that it has jurisdictional competence to consider, in addition to questions of violation of the Bill of Rights and questions whether anything said to be done under the authority of *the Constitution* or any law is in contravention of *the Constitution*, and any “matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government.”

Orders

20. Accordingly, for the reasons set out above, this court finds that the Preliminary Objection dated 6/11/2023 is without merit and it is dismissed.

21. There shall be no orders as to costs.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER, 2024.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Brian Mwirigi for the Petitioners.

Ms. Kiunga for Mr. Eric Theuri for the 1st Respondent.

Mr. Aluku with Mr. Lesaigor for 2nd Respondent.

N/A for the Interested Parties.

